Court File No. 31892

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N

DONNOHUE GRANT

(Appellant)

– and –

HER MAJESTY THE QUEEN

(Respondent)

CANADIAN CIVIL LIBERTIES ASSOCIATION, INTERVENOR FACTUM

[*Rules of the Supreme Court of Canada,* Rule 42]

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TABLE OF CONTENTS

PART I - STATEMENT OF FACTS

1. The Canadian Civil Liberties Association ("CCLA") files its Factum and Book of Authorities pursuant to the Order of Rothstein J. dated January 2, 2008. The CCLA accepts the facts as outlined in paragraphs 3 to 4 of the Appellant's factum.

PART II - ISSUES

2. #1 Should the Court simplify the principles for excluding of evidence obtained in violation of the *Charter* under section 24(2)?

#2 Should the meaning of "detention" under section s. 9 be extended?

PART III - STATEMENT OF ARGUMENT

Overview

3. The C.C.L.A. respectfully submits that

(1) The Court should adopt a simplified, discretionary approach to the exclusion of evidence under section 24(2) of the *Charter* applying to any *Charter* breach, which abandons the overly complex and unsatisfactory distinction between conscripted and non-conscripted evidence and also the doctrine of discoverability;

(2) The Court should decide that the following general principles it unanimously adopted for non-conscripted evidence cases in *R.* v. *Buhay* should apply to all *Charter* breaches:

(a) There are no rules of automatic exclusion or inclusion;
(b) Deference must be given to section 24(2) rulings of trial judges; and
(c) The central consideration is the seriousness of the breach rather than the reliability of the evidence or the seriousness of the offence;

(3) Instead of using the labels of police good or bad faith, the Court should state clearly that a *Charter* breach will be considered *especially serious* where the police have intentionally breached a *Charter* standard and *serious* where the breach was negligent, and that police misperception or ignorance of *Charter* standards will only mitigate a *Charter* breach where the Crown has shown due diligence by the police in their attempt to comply with *Charter* standards; and

(4) The Court should re-affirm that psychological compulsion triggers section 9 protections in both vehicle and pedestrian stops AND decide that detention occurs where police suspicion reaches the point of attempting to obtain incriminating evidence.

ISSUE #1 - A SIMPLIFIED, DISCRETIONARY APPROACH TO SECTION 24(2) SHOULD BE APPLIED TO ALL *CHARTER* BREACHES

(1) Abandoning the Conscripted/Non-conscripted Dichotomy and the Doctrine of Discoverability

4. It is respectfully submitted that the distinction between conscripted and non-conscripted evidence drawn by the Supreme Court in *R.* v. *Collins* by Chief Justice Lamer as a "matter of personal taste", and re-affirmed by Justice Cory in *R.* v. *Stillman,* has proved to be unsatisfactory and overly complex, and should be abandoned.

R. v. Collins, [1987] 1 S.C.R. 265 at para. 36
R. v. *Stillman* [1997] 1 S.C.R. 607 at para., 80

5. For several years the effect of *Stillman* was the drawing of a bright line: conscripted evidence was almost always excluded and non-conscripted evidence almost always included. Clearly that is far from what the framers intended given the legislative history and the discretionary wording of s. 24(2).

R. v. Stillman supra per McLachlin J. (dissenting)
R. v. Orbanski; R. v. Elias [2005] 2 S.C.R. 3 (per Lebel and Fish JJ.)

6. A satisfactory definition of conscription has proved elusive. In *Stillman,* Justice Cory describes conscription broadly as a process in which the accused is "compelled to participate in the creation or discovery of the evidence," and also as a narrow category approach of compelled incrimination "by means of a statement, the use of the body or the production of bodily samples". Courts now tend to rely on the category test when defining conscription. Especially in the case of statements this leads to strange results. Where a statement by accused to the police was obtained in violation of section 10(b) but there was no issue of voluntariness in what sense can the accused be said to have been compelled?

R. v. Stillman supra at paras. *75, 80*

7. In the view of most academics and many judges, the distinction between conscripted and non-conscripted evidence is overly complex and arbitrary. Apart from the difficult issue of definition, different approaches must be followed when considering conscripted and non-conscripted evidence, even in the same trial. Furthermore a breach relating to conscripted evidence is not necessarily more serious than a breach relating to non-conscripted evidence. There is no presumption of exclusion, for example, where a drug squad ransacks a private dwelling without bothering to get a warrant in deliberate violation of s. 8.

Exclusion should not be based on artificial categories. Instead, what should be at stake is the integrity of the justice system in admitting evidence obtained in breach of the *Charter* where the breach was serious.

8. In the Court below, Justice Laskin's decision in *R.* v. *Grant* breaks new ground in deciding that it is appropriate in conscripted cases to look at the degree of trial unfairness. Given the reliability of the evidence and the nature of the police conduct the impact on trial fairness was held to lie at the less serious end of the trial fairness spectrum. It seems odd that a judge can acknowledge that a trial is even somewhat unfair and yet admit the evidence. The problem here is of the *Stillman* majority's making in their over-inflated use of the phrase "fairness of the trial".

R. v. *Grant* (2006) 38 C.R. (6th) 58 (Ont.C.A.) at para. 52

9. The doctrine of discoverability set out in *Stillman* allows the second and third *Collins* factors to be considered in conscripted cases where the police would have found the evidence without violating the *Charter*. This adds an obtuse inquiry and does not make sense. Why ask this question at all, other than as a pragmatic device to allow those factors to be considered in some cases? Questions of legal remedy should turn on the evidence before the trier of fact, not on what might have been the reality. Furthermore the fact that the police could have found the evidence without breaching the *Charter* makes the violation more serious and should therefore more likely to result in exclusion. This proposition is accepted in *Collins* and re-asserted in *Buhay* but is often overlooked by lower courts, to the detriment of accused. The doctrine would be superfluous if the distinction between conscripted and non-conscripted evidence were to be abandoned.

R. v. *Collins* [1987] 1 S.C.R. 265 at para. 38
R. v. *Buhay* [2003] 1 S.C.R. 63 at para 63

(2) <u>The Principles Articulated in *R.* v. *Buhay* Should Apply to All *Charter* Breaches</u>

10. The Court should apply the general principles for s. 24(2) it unanimously adopted for non-conscripted cases in *R.* v. *Buhay* to all cases where there has been a *Charter* breach:

(a) There are no rules of automatic exclusion or inclusion;
(b) Deference must be given to s. 24(2) rulings of trial judges; and
(c) The central consideration is the seriousness of the *Charter* breach rather than the reliability of the evidence or the seriousness of the offence.

R. v. *Buhay supra*

11. In *R.* v. *Buhay*, Justice Arbour provided a tightly reasoned re-statement of the current position of the Court respecting exclusion of non-conscripted evidence:

> Section 24(2) is not an automatic exclusionary rule [...]; neither should it become an automatic inclusionary rule when the evidence is non-conscripted and essential to the Crown's case.

The combined effect of these pronouncements – deference to trial judges and no automatic inclusion – should, and has, led to greater exclusion of non-conscripted evidence.

R. v. *Buhay supra* at para. 71

12. The C.C.L.A. respectfully submits that the Court should make it clear that the central consideration is the seriousness of the breach rather than the reliability of the evidence or the seriousness of the offence. The criteria used to determine the seriousness of the breach should include those long established by the Supreme Court starting in *Collins* and crystallised in *Law* and *Buhay*. The Court should change the presumption that conscripted evidence should be excluded and instead declare that any police compulsion in obtaining evidence in violation of the *Charter* will make the violation more serious.

R. v. *Law* [2002] 1 S.C.R. 227
R. v. *Buhay supra*

13. In his analysis of trial fairness and the second and third *Collins* factors, Laskin J.A. in *Grant* emphasises the reliability of the evidence. This focus is not apparent in the Court's rulings to exclude non-conscripted evidence of drugs in both *Buhay* and *Mann*. Justice Laskin contrasts cases of statements obtained in violation of s. 10(b), which he says raise reliability issues. There is, however, much case law excluding confessions for 10(b) violations where it was clear the statement was voluntary and, therefore, there was likely no issue of reliability. The right focus is on whether the breach was serious.

R. v. *Grant supra* at paras. 53-54 and 65
R. v. *Buhay supra*
R. v. *Mann* [2004] 3 S.C.R. 59

14. Since the time of the drafting of the *Charter* in 1982 the C.C.L.A. has consistently urged that there be an effective remedy of exclusion for *Charter* breaches to ensure that *Charter* rights for all are meaningful. The danger of the *Grant* focus on reliability and seriousness of the offence is that it there will be far less exclusion of evidence found following *Charter* violations. This will considerably diminish the importance of carefully balanced *Charter* standards for policing that the Court has taken great pains to put in place since the entrenchment of the *Charter* in 1982.

R. v. *Grant supra* at para. 65

15. There are dangers in adopting a test of "proportionality" between the seriousness of the violation and the seriousness of the offence. A criminal trial under a system of entrenched *Charter* rights for accused has to concern itself with the truth of police abuse and disregard of *Charter* standards, not just the truth of the accused's guilt. Without the remedy of exclusion in cases where the court considers the crime serious there will be a large number of criminal trials where the *Charter* will cease to provide protection. There will be a significant risk that the public will see no sanction for *Charter* violations. This could create public cynicism regarding the integrity of our system of law enforcement. There cannot be a *de facto* two-tier system where one zone is *Charter*-free and the police ends always justify the means. There must be a real risk of exclusion for serious *Charter* breaches even in cases of serious crimes, as the Court has previously determined, for example, even in double murder cases.

R. v. *Burlingham* [1995] 2 S.C.R. 206
R. v. *Evans* [1991] 1 S.C.R. 869

16. Commendably there is resistance by some trial judges to *Grant*, especially at the level of the provincial Courts where the vast majority of criminal trials now occur. As recognised in *Buhay*, judges at this level of local immersion are in the best position to know on a daily basis whether *Charter* standards are being broken and what remedy is warranted. In excluding, these judges have focussed on the seriousness of the violation and the role of courts as guardians of the *Constitution*. Were the Court to confirm the focus in *Grant* on the reliability of the evidence and seriousness of the offence such rulings would be in error.

R. v. *Buhay supra* at paras. 46-47

R. v. *Payne* (2006) 41 C.R. (6th) 234 (Nfld. & Lab. S.C.) at paras. 50-63 (bloody socks seized in violation of ss. 8 and 9) [C.C.L.A. Book of Authorities Tab 1]

R. v. *Nguyen* (2007) 45 C.R. (6th) 276 (Ont. C.J.) at paras. 48-49 (roadside breath sample where delay breaching ss.10(a) and (b) [C.C.L.A. Tab 2]

R. v. *D.(J.)* (2007) 45 C.R. (6th) 292 (Ont. C.J.) at paras. 76-79, 85-90 (gun and burglary tools in stop of youth in high crime area in violation of sections 8 and 9) [C.C.L.A. Tab 3]

R. v. *Champion* (2008) 52 C.R. (6^{th}) 201 (Ont. C.J.) at paras. 46-60 (breathalyser evidence due to breach of s. 10(b) right to consult counsel in private) [C.C.L.A. Tab 4]

R. v. *Williams* (2008) 52 C.R. (6^{th}) 210 (Ont. S.C.) at paras. 24-30 (marihuana and crack cocaine found by stop of known drug dealer in violations of ss. 8 and 9) [C.C.L.A. Tab 5]

17. In *R.* v. *B.(L.)* Justice Moldaver of the Ontario Court of Appeal did not have to consider section 24(2), since he found no *Charter* violation, but he indicated that exclusion should only be for egregious police behaviour and that "most Canadians" would not countenance not having a trial on the merits for a person found with a gun. Under this test, exclusion should be rare where the evidence is reliable and the

offence serious and should only occur when the community would be shocked. This view was expressly rejected in *Collins*. In the subsequent twenty years of jurisprudence it has only been supported in the dissenting opinion of Justice L'Heureux-Dubé in *Burlingham*. This approach should be clearly rejected again. Otherwise *Charter* standards for policing will become largely meaningless. There must be a sanction for serious *Charter* breaches. Courts must be above law and order politics.

R. v. *B.(L).* (2007) 49 C.R.(6th) 245 (Ont. C.A.) at paras. 80-82
R. v. *Collins supra* at para. 41
R. v. *Burlingham* supra

18. The remedy of exclusion for *Charter* breaches has proved to be an important vehicle to hold agents of the State indirectly and publicly accountable. Where there are patterns of inclusion despite police breaches there will be less incentive for police to take the *Charter* seriously. Those preferring alternative remedies, such as civil suits and police complaints procedures, now bear a heavy burden of demonstrating their comparative efficacy. They have thus far proved to be a poor and low visibility response to systemic problems of police abuse or ignorance of their powers. Police are rarely, if ever, disciplined for *Charter* breaches that uncover evidence of criminality. Civil litigation is expensive, uncertain in outcome, and, if successful, likely to be subject to confidentiality agreements. Civil litigation is highly unlikely where the plaintiff is in prison.

Data collected by C.C.L.A. [Tab 6]

19. In considering the s. 24(2) remedy Courts must be concerned with the long-term integrity of the justice system if *Charter* standards for accused are ignored and/or operate unequally against vulnerable groups, such as persons of colour and those who are persons. In developing standards for strip searches the majority of the Court in *R.* v. *Golden* took into account Commission findings of over-representation of African Canadians and Aboriginals in the Canadian criminal justice system and likely disproportionality in arrests and searches. This sensitivity should also inform the development of an effective s. 24(2) remedy. The *Charter* is in place to try to ensure that minorities are fairly treated by the State.

R. v. *Golden* [2001] 3 S.C.R. 679 at para. 83
R. v. *Harris* (2007) 49 C.R. (6th) 270 (Ont. C.A.) at para. 63

(3) <u>No Mitigation for Good Faith if No Diligent Effort to Comply with the *Charter*</u>

20. The Court needs to clarify the meaning of good faith on which s. 24(2) rulings so often turn. Instead of using the politically and emotionally charged labels of "good faith" versus "bad faith", the Court should employ the familiar legal concepts of intention and negligence. A *Charter* breach should be considered

especially serious where the police have *intentionally* breached the *Charter* and *serious* where the police breach was a result of negligence. Police misperception or ignorance of *Charter* standards should only mitigate the breach where they have shown due diligence in their attempt to comply.

21. According to *Buhay*, police good faith must be reasonably based. Justice Arbour, speaking for the full Supreme Court, was concerned that one officer had demonstrated a "casual attitude" to the accused's *Charter* rights and the other "blatant disregard". Neither officer was found to have acted in good faith.

> *R.* v. *Buhay supra* at paras. 59-61

22. According to Justice Laskin in *Grant* there was no bad faith and no institutional indifference to individual rights. Given that the Court decided that the stop was in violation of the *Mann* standards, and that such good faith arguments were not accepted in *Mann* itself, this view is clearly in error.

> *R.* v. *Grant supra* at paras. 62-63

23. In *R.* v. *Washington*, the B.C. Court of Appeal wrestled for almost a year over the question of whether the police had acted in good faith when they conducted a warrantless search of a package found to contain drugs by airport authorities. This contravened the
Supreme Court's decision in *Buhay*, handed down six weeks prior to the search. Justice Ryan (Lowry J.A. concurring) for the majority decided that it was reasonable for the police to believe that they had the authority to act and that the evidence should therefore be admitted. Justice Rowles in dissent relied on a comprehensive review of the Supreme Court's dicta that good faith cannot be found where police made an unreasonable error as to a *Charter* standard or were ignorant of it. With Justice Rowles in dissent it is hard to accept that the police in *Washington* showed due diligence in failing to comply with, or know about, the *Buhay* ruling.

> *R.* v. *Washington* (2008) 52 C.R. (6th) 1 (B.C.C.A.) at paras. 115-138) [C.C.L.A.Tab 7]
> Stephen Coughlan, "Good Faith and Exclusion of Evidence under the *Charter*" (1992) 11 C.R. (4th) 304 [C.C.L.A. Tab 8]

24. Justice Doherty of the Ontario Court of Appeal has pointed to dangers of labels such as good or bad faith in *R.* v. *Kitaitchuk*:

> Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights […]

and in *R.* v. *Harris*:

> Police misconduct resulting in a *Charter* violation can be placed on a continuum [...] between the two extremes of a good faith error and a blatant disregard for constitutional rights

R. v. *Kitaitchuk* (2002), 4 C.R. (6th) 38 (Ont. C.A.) at para. 41, relying on C. Hill, "The Role of Fault in Section 24(2) of the *Charter*", The *Charter*'s Impact on the Criminal Justice System (1996) p.57)
R. v. *Harris supra* at para. 62

25. It is time to expressly disavow the utility of the politically and emotionally charged labels of good or bad faith, which have produced uncertainty and inconsistency. Judges are very familiar with deciding whether conduct was intentional or negligent. Decisions would likely be more consistent if it was made clear that a breach can only be mitigated where the police made a diligent effort to comply with the *Charter*. We should expect police not to be careless about *Charter* rights. As in the case of the tort of negligent investigation, the standard should be that "police act professionally and carefully, not just to avoid gross negligence"

Hill v. *Hamilton –Wentworth Regional Police Services Board* 2007 SCC 41 at para. 70 (per McLachlin C.J. for the majority)

ISSUE #2 - THE MEANING OF DETENTION SHOULD BE WIDENED

(4) Psychological Detention OR Attempting to Obtain Incriminating Evidence

26. Iacobucci J. remarked in *obiter* for the majority in *Mann* that police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview and that constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint. It is respectfully submitted that this test of degree is too uncertain and also misses civil liberty concerns about general stop powers. The Supreme Court could not have intended that the careful limits they were placing on investigative detention based on individualized suspicion could be completely bypassed by the current police practice in Toronto, as in *Grant*, of approaching persons on the street, especially young persons and/or persons of colour, getting their names, doing a C.P.I.C. search and then launching into aggressive questioning aimed at incrimination.

R. v. *Mann supra* at para 19
R. v. *D.(J.) supra*
R. v. *Williams supra*

27. The Court should confirm that Ontario Court of Appeal's ruling in *Grant* that the concept of psychological detention applies to both vehicle and pedestrian stops where there is a reasonable belief that there is no choice but to comply with a police request. Courts should not play down the coercive realities of all exchanges with police.

Sed contra R. v. *B.(L.) supra*

28. The problem with a sole focus on physical or psychological detention is, however, that this leaves one who naively thinks he or she is free to go without *Charter* protection. The test also encourages police to avoid section 9 and 10 rights by delaying arrest, and resorting to such strategies as telling the detainee he or she is free to leave when in fact they are not and are suspected of criminal activity. These concerns would be addressed by an alternative test that detention also occurs where police have a suspicion which has reached the point that they are attempting to obtain incriminating evidence. This was the compromise test carefully articulated by a majority of the Newfoundland Court of Appeal in *R. v. Hawkins.* On the appeal as of right to the Supreme Court this approach was implicitly rejected in the briefest of reasons consisting of a one sentence assertion that the accused was detained. The CCLA respectfully suggests that it is time to fully reconsider.

R. v. *Hawkins* (1992) 14 C.R. (4th) 286 (Nfld. C.A.) at paras. 26-32 [C.C.L.A. Tab 9]; rev'd [1993] 2 S.C.R. 157

PART IV- COSTS

29. The CCLA respectfully requests that there be no order as to costs given the importance of the *Charter* issues at stake.

PART V - ORDER SOUGHT

30. The CCLA respectfully requests the Court to allow the appeal and substitute an acquittal.

31. The CCLA respectfully requests permission to present oral argument for no longer than 20 minutes.

ALL OF WHICH is respectfully submitted, at Kingston, Ontario, this 22nd day of February 2008, by

Don Stuart
Counsel for the Intervener
The Canadian Civil Liberties Association